Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-714

MARTY'S FLOOR COVERING CO., INC.,

Petitioner,

vs.

GAF CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Marty's Floor Covering Co., Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on July 19, 1979.

OPINIONS BELOW

The opinion of the Honorable Richard B. Kellam of the United States District Court for the Eastern District of Virginia is unreported and is printed in Appendix A, *infra*. The opinion of the Honorable John A. MacKenzie of the United States District Court for the Eastern District of Virginia is unreported and is printed in Appendix B, *infra*. The judgment of the United States Court of Appeals for the Fourth Circuit is not yet reported, and is printed in Appendix C, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 19, 1979. A timely petition for rehearing *en banc* was filed on August 2, 1979, and denied on August 17, 1979. (Appendix D, *infra*). The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Under the Sherman Anti-Trust Act, 15 U.S.C. §1, petitioner brought an action alleging that respondent engaged in a resale price maintenance scheme by determining the resale prices of its distributor, Norman Deitch of Maryland, Inc. The District Court found no violation of the Sherman Act on the grounds that respondent did not infringe upon its distributor's freedom to resell. After the entry of judgment against petitioner, petitioner filed a timely Affidavit of Prejudice pursuant to 28 U.S.C. §§144 and 455, and a motion for new trial, requesting that the presiding judge recuse himself and grant a new trial. Petitioner's motion for new trial was denied on June 8, 1978.

The Court of Appeals affirmed, holding that 28 U.S.C. §§144 and 455 provided only prospective relief, and even if the award of a new trial was a proper remedy, there were no grounds for reasonably questioning the trial judge's impartiality. With regard to petitioner's Sherman Act claim, the Court reversed the trial court and held that it was uncontested that respondent controlled and quoted Deitch's resale prices. However, the Court affirmed the District Court's decision on new grounds, concluding that Deitch was not an independent distributor, and therefore, there was no violation of the Sherman Act. The questions presented are:

1. Did the Court of Appeals create a new and untenable exception to the Sherman Anti-Trust Act ban on resale price maintenance by holding, despite stipulations and findings that Deitch was an independent purchaser, that Deitch was not an independent purchaser under the Act, and therefore, there was no violation of the anti-trust laws?

2. Did the Court of Appeals ignore the intent of Congress by holding that 28 U.S.C. §§144 and 455 do not afford a party relief in the form of a new trial where it was established after trial that, at one time, the presiding judge was an incorporator, director and officer of a distributor/dealer of products manufactured and sold by respondent, and at the time of trial, the judge's brother and numerous relatives continued to own, manage and operate the same company?

3. Did the District Court and the Court of Appeals err by finding there were no grounds for reasonably questioning the impartiality of the trial judge where, at one time, he was an incorporator, director and officer of a company which was a distributor/dealer of products manufactured and sold by respondent, and at the time of trial his brother and other relatives were owners, directors and officers of the same company?

STATUTES INVOLVED

The statutes involved are the Sherman Anti-Trust Act, 15 U.S.C. §1, and 28 U.S.C. §§144 and 455, the provisions of which are printed in Appendix E, *infra*.

STATEMENT OF THE CASE

Petitioner is a Virginia corporation engaged in the sale and installation of carpeting, floor tile and floor tile products. Respondent is a Delaware corporation engaged in the manufacture and sale of floor tile and floor tile products.

Prior to June 1, 1975, petitioner bought tile directly from respondent by placing purchase orders with respond-

ent's offices in Vails Gate, New York. Delivery was made directly to petitioner, and invoices were issued to and paid by petitioner directly. Prices were quoted to petitioner by respondent's salesman, Robert Spurgeon.

After June 1, 1975, sales of respondent's goods were made to petitioner through the area distributor for respondent, known as "Norman Deitch of Maryland, Inc." (hereinafter referred to as "Deitch"). Prices continued to be set by respondent and quoted directly by Mr. Spurgeon, respondent's salesman. Petitioner would submit a purchase order to Deitch, Deitch would pay respondent the quoted price less a certain percentage, and then bill petitioner at the quoted price. This percentage was Deitch's margin of profit, and was determined solely by respondent. Respondent continued to deliver goods directly to petitioner, but petitoner would then make payment to Deitch.

On March 24, 1977, petitioner filed a civil action in the United States District Court for the Eastern District of Virginia, jurisdiction being based upon 28 U.S.C. §1337. Petitioner's complaint initially alleged a violation of the Robinson-Patman Act and breach of contract. Subsequent amendments added allegations of estoppel, misrepresentation and a violation of the Sherman Anti-Trust Act. After trial, the submission of briefs and oral argument, the Court entered an opinion on May 3, 1978 dismissing petitioner's complaint and denying all requests for relief. Despite finding that respondent controlled Deitch's resale terms, the District Court concluded that respondent had not interfered with its distributor's freedom to resell, and therefore, there was no violation of the Sherman Act. (Appendix A).

After the District Court had rendered its opinion, petitioner discovered that the brother of the presiding judge was a distributor/dealer of products manufactured and sold by respondent. Frank Kellam, brother of the Honorable

Richard B. Kellam, was an owner, director and officer of Kellam & Eaton, Inc., a distributor/dealer of floor tile and other products manufactured by respondent. Numerous other family members participated in the ownership and management of the company. Judge Kellam at one time was an incorporator, director and officer of the corporation, and had provided it with legal representation before taking the bench.

Based on this information, petitioner filed an Affidavit of Prejudice pursuant to 28 U.S.C. §144 requesting that Judge Kellam recuse himself, and also filed a motion for new trial. A hearing was conducted by the Honorable John MacKenzie after Judge Kellam recused himself from further proceedings. After hearing evidence in addition to petitioner's Affidavit of Prejudice, Judge MacKenzie denied petitioner's motion for new trial on June 8, 1978. (Appendix B).

Petitioner then filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on July 8, 1978. The Court of Appeals reversed the trial court's finding that respondent had not interfered with Deitch's freedom to resell, and held that it was uncontroverted that respondent controlled its distributor's prices. Despite this, the Court of Appeals affirmed the District Court decision, since it found Deitch did not act as an independent distributor, but merely performed the duties of a collection agent. The Court otherwise affirmed the District Court judgment in an opinion rendered on July 19, 1979. A timely motion for rehearing *en banc* was denied on August 17, 1979.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals to affirm the District Court's dismissal of petitioner's complaint totally ignores the facts presented to the trial court and has resulted

in a new and unacceptable interpretation of the Sherman Anti-Trust Act. The reach of the Court of Appeals decision is limitless, and if left standing, threatens to undermine the Sherman Act and the cases decided thereunder.

The Sherman Act was designed to preserve and promote competition in the economic market place. *Northern Pac. Rwy. Co.* v. *United States,* 356 U.S. 1 (1958). Resale price maintenance, as a form of price fixing, was labelled a *per se* violation of Section 1 of the Sherman Act in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911). Any restriction on a purchaser's freedom to sell in accordance with his own judgment constitutes resale price maintenance. *Adolph Coors Co.* v. *F.T.C.,* 497 F.2d 1178 (10th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).

The Supreme Court has carved only two exceptions to the prohibition against resale price maintenance. In *United States* v. *Colgate & Co.,* 250 U.S. 300 (1919), this Court held that a manufacturer may legally set the resale prices of its purchaser, and refuse to deal with that purchaser if it fails to comply with the set prices. But the manufacturer may not take any action beyond a mere refusal to deal to force compliance with the resale prices. *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960). In *United States* v. *General Electric Co.,* 272 U.S. 476 (1926), this Court held that a manufacturer, pursuant to a valid consignment or agency agreement, may control the prices charged by its agents. However, the reach of this holding was limited in *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964), where it was concluded that a consignment or agency agreement will not be allowed to conceal a pervasive network of price fixing, especially where the "agent" or "consignee" has all or most of the "indicia of entrepreneurs". 377 U.S. at 20. Since *Simpson,* this Court has not addressed consignment or agency agreements as exceptions to the Sherman Act

prohibition on resale price maintenance schemes. See *Hardwick* v. *Nu-Way Oil Co.,* 589 F.2d 806 (5th Cir. 1979). This Court has otherwise rigidly applied the prohibition against resale price maintenance to all situations where a manufacturer has attempted to fix the resale prices of its purchaser.[1] The Court of Appeals, by its decision in the instant case, has created a new and unreasonable exception to this strict rule.

Prior to trial in the instant case, the parties entered into the following stipulations [2]:

> 14. After May 30, 1975, [petitioner] continued as a customer of [respondent's] products but purchased GAF goods through [respondent's] distributor for the Maryland, District of Columbia, and Northern Virginia area, known as "Norman Deitch of Maryland, Inc.", (hereinafter referred to as "Norman Deitch").
>
> 15. The distributors for [respondent] warehouse and sell GAF floor tile products to dealers and other wholesale and retail customers in their respective geographic areas. The dealers and wholesale and retail customers are independent businesses which do not exclusively purchase GAF floor tile products. Norman Deitch of Maryland, Inc., deals primarily in GAF commercial floor tile products. These dealers and wholesale and retail customers of Norman Deitch include the [petitioner] and some of the direct competitors of [petitioner].

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[1] Most recently, in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977), this Court re-affirmed the *per se* approach to vertical price fixing arrangements. *See* fn. 18 at 51.

[2] A stipulation is binding and conclusive on the court. *Morse Boulger Destructor Co.* v. *Camden Fibre Mills,* 239 F.2d 382 (3d Cir. 1956). A court does not have the power to make findings contrary to the terms of such an agreement, *Burstein* v. *United States,* 232 F.2d 19 (8th Cir. 1956), and relief from a stipulation is only warranted under exceptional circumstances. *Farmers Co-op Elevator Ass'n* v. *Strand,* 382 F.2d 224 (8th Cir. 1967), *cert. denied,* 389 U.S. 1014 (1967).

The Court of Appeals ignored these pre-trial stipulations, and professed to "[look] to the substance of the parties' dealings rather than merely to form".[3] (Appendix C at 5c). The Court of Appeals then found that Deitch was a factor or discounter rather than a distributor, and thus, did not purchase goods from respondent. (Appendix C at 5c). Although the appellate court stated it was merely accepting the conclusions of the District Court, the District Court made no such finding.[4] In fact, the District Court found that Deitch *actually* bought the goods from respondent, petitioner was one of Deitch's customers, and Deitch was an independent distributor of respondent's goods. (Appendix A at 1a, 2a, 20a).

Moreover, the Court of Appeals ignored its own earlier conclusion that there was a "transfer of title to the tile sold from [respondent] to Deitch and then from Deitch to [petitioner]." (Appendix C at 5c). The Court terms this a "technical" transfer, but the fact remains that Deitch obtained title to the goods sold, and therefore, was more than a mere collection agent for respondent. Although the arrangement may resemble a discounting relationship, the relationship between respondent and Deitch was clearly that of manufacturer and distributor.[5] There was no basis,

[3] The courts have often pierced form in order to reach substance in these type of cases, but in the instant case, the parties *stipulated* that Deitch was an independent distributor and there was no claim by respondent that Deitch was anything other than a distributor. The Court should be wary of supposedly bypassing form for substance in order to *avoid* finding a violation of the anti-trust laws in such a case.

[4] The trial court found that the role of Deitch "seem[ed] to be merely that of a factor or discounter." (Appendix A at 20a).

[5] By definition, a manufacturer who sells its goods to a purchaser and retains control over the terms of resale is engaging in an illegal resale price maintenance violation of the Sherman Act. *Dr. Miles, supra.* Since the purchaser has no power over its resale terms, it performs only collection functions, and despite its independent status

in the evidence, in the opinion of the District Court, or in its own findings, for the conclusion of the Court of Appeals.

The Court of Appeals has created a dangerous exception to the well-established ban on resale price maintenance. To say that a manufacturer can reduce its distributor's functions to that of a collection agent is to state a clear example of a resale price maintenance violation of the Sherman Act. This Court has never held this to be acceptable, and should not allow the Court of Appeals decision to stand.

II.

Title 28, Section 455 of the United States Code delineates the circumstances under which a judge must disqualify himself from a proceeding. Section 455 was amended in 1974 to create an objective standard governing the recusal of a judge, i.e., a judge is required to recuse himself when his "impartiality might reasonably be questioned". 28 U.S.C. §455(a). This replaced the prior subjective standard which required recusal when a judge felt it was improper "in his opinion" to continue in a proceeding, and was "designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case." H.R.Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974). Where the belief may arise in the public's mind that a judge might favor one party over another, disqualification is required to preserve the integrity of the judiciary. *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110 (7th Cir. 1977).

as a purchaser, will appear to be a factor or discounter. If one accepts the holding of the Court of Appeals, a manufacturer could never engage in a resale price maintenance scheme in violation of the Sherman Act, since its distributor could be merely labelled a factor or discounter.

Section 144 of Title 28 of the United States Code sets forth the mechanism for obtaining the disqualification of a judge pursuant to 28 U.S.C. §455. *Davis* v. *Board of School Com'rs*, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Where a party feels there is a basis for recusal, an Affidavit of Prejudice should be filed, setting forth the facts supporting disqualification. Based on this affidavit, and accepting the allegations therein as true, the judge must decide whether sufficient grounds for recusal exist. *Berger* v. *United States*, 255 U.S. 22 (1921). If the affidavit alleges sufficient facts to give a reasonable person a reasonable basis to question the judge's impartiality, he must step down and assign the case to another judge. *Rice* v. *McKenzie*, 581 F.2d 1114 (4th Cir. 1978).

In the instant case, petitioner filed such an affidavit, and at the same time, moved for a new trial. Without holding a hearing, Judge Kellam recused himself and turned the proceedings over to Judge MacKenzie. Judge MacKenzie then held a hearing, received evidence from respondent and *sua sponte* requested and heard oral testimony from Judge Kellam. Based on this evidence, Judge MacKenzie denied petitioner's motion for new trial.

The Court of Appeals affirmed this decision holding that §§144 and 455 did not provide prospective relief, and therefore, a new trial was not available as a remedy. (Appendix C at 3c). In reviewing the trial court's denial of petitioner's motion for new trial, the Court found there was insufficient evidence to warrant the award of a new trial. (Appendix C at 4c).

By holding that §§144 and 455 afford only prospective relief, the Court failed to consider the intent of Congress in enacting this legislation. Where the basis for recusal is discovered early in the proceedings, prospective relief certainly protects the objecting party, since little if anything, has transpired which would prejudice him. But, as in the

instant case, if the basis for recusal is not revealed until late in the proceedings or after the conclusion of the trial, recusal of the judge from all further proceedings does not remedy the possible prejudice to the objecting party. In fact, to blindly adhere to such a hard and fast rule would only encourage the concealment, whether willful or negligent, of business and social relationships.

Section 455 places the burden upon the judge to "inform himself about his personal and fiduciary financial interests", and thus it is his responsibility to raise the question of recusal. 28 U.S.C. §455(c). Where the judge fails to fulfill this responsibility, it falls upon the litigants to ascertain his interests and relationships, and should some conflict be discovered after the completion of trial, the objecting party should not be penalized for failing to discover this information earlier in the proceedings.

It is clear that Congress was interested in ensuring public confidence in the judicial system, and this interest is entitled to great respect. *Morial* v. *Judiciary Com'n of State of La.*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). To make a blanket assertion that §455 only contemplates prospective action without consideration of the underlying facts and circumstances is to ignore the Congressional intent. Section 455 is the codification of the standard by which judges are to act, and where a judge has failed to properly disqualify himself, all necessary steps must be taken to remedy his failure, including the award of a new trial.

The Court of Appeals erred by holding that there was no basis for recusal. The allegations of petitioner's affidavit of prejudice clearly raise a reasonable doubt as to Judge Kellam's impartiality:

> 1. His brother is presently an owner, director and officer of Kellam & Eaton, Inc.

2. Kellam & Eaton, Inc., is a distributor/dealer of respondent's floor tile and floor tile products.

3. Judge Kellam was an incorporator, officer and director of the corporation prior to taking the bench.

4. Numerous other family members were involved in the ownership, operation and management of the company.

These facts alone raise a reasonable question concerning the judge's impartiality. In addition, the instant action involved a course of dealings between respondent and its distributor, Norman Deitch of Maryland, Inc. As a distributor/dealer of respondent's tile products, Judge Kellam's brother was in the same position as Norman Deitch of Maryland, Inc. The outcome of the instant case would affect respondent's dealings with its distributors, including its relationship with Judge Kellam's brother. What effect, if any, this may have had on Judge Kellam's decision in this case is something that cannot be ascertained. But it is precisely for this reason that the objective standard of §455 was enacted.

Judge Kellam's relationship to a distributor/dealer of respondent's products raises a reasonable question as to his impartiality. Considering the additional fact that the relationship between respondent and the judge's brother could be adversely affected by his decision in the instant case, there can be no doubt that a reasonable man would consider the judge to have a conflict of interest. The only proper remedy available is the award of a new trial.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Unpublished Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 77-237-A

MARTY'S FLOOR COVERING CO., INC.,
Petitioner,

vs.

GAF CORPORATION,
Defendant.

OPINION AND ORDER

Marty's Floor Covering, Inc. (Marty's) brings this action against GAF Corporation (GAF) alleging six grounds of recovery. Each ground will be discussed separately. Marty's furnishes and installs tile as a subcontractor for general contractors, and also has a small volume of retail tile sales. GAF is a tile manufacturer who supplied Marty's directly from 1966 until May 30, 1975, and through the Norman Deitch of Maryland distributorship (Deitch) since June 1, 1975.

I

The first count arises under the Robinson-Patman Act, 15 U.S.C. §13, and alleges that the defendant discriminated in price against the plaintiff by offering discounts to the plaintiff's competitors, but not to the plaintiff. The defend-

ant denies discriminating in price between competitors, and argues in the alternative that even if there was price discrimination there was no injury to competition. Finally, if the Court should find Marty's has proved a prima facie case, GAF asserts the affirmative defense of meeting competition under §13(b).

If Marty's is to hold GAF liable under the Robinson-Patman Act, it must first prove to be a purchaser of GAF. After May 30, 1975 Marty's was not purchasing directly from GAF, but was buying through Deitch. However, there need not be privity of contract between the manufacturer and the ultimate buyer to find that the buyer is a purchaser under §13(a).

> If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a "customer" or "purchaser" of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys.

American New Company v. *F.T.C.*, 300 F.2d 104, 109 (2d Cir. 1962).

On the facts in this case, the Court finds that Marty's was a "purchaser" from GAF under the Robinson-Patman Act. Marvin Kaulkin, Vice President and General Manager of the Hyattsville branch of Deitch, testified that Deitch got the invoice prices it bills to Marty's from the local GAF representative, Robert Spurgeon, and that Deitch does not usually participate in any way in the determination of the price. Spurgeon testified that he quotes prices to the customers and if Deitch bills them differently from his quotations the customers will complain to him. On at least one occasion Spurgeon was responsible for getting Deitch to lower its price to that which he had quoted. Kaulkin further testified that to get additional profits he would have to talk to Spurgeon. From this it appears that GAF deals

directly with Marty's and also controls the terms on which it buys.

Marty's must next prove a discrimination in price. A discrimination in price may simply be a difference in price, *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). GAF contends Marty's has failed to do this because it has only shown a difference in invoice prices, but not in prices actually paid, and that discriminatory invoice prices are not sufficient to prove a violation of the Act. The cases cited by GAF in support of this proposition are not persuasive, and in Stipulation 22 GAF admits it has granted lower prices for the same products to some of the plaintiff's competitors.

Price differentials alone, however, are not a violation of the Act. *Whitaker Cable Corp.* v *F.T.C.*, 239 F.2d 253 (7th Cir. 1956), *cert. den.*, 353 U.S. 938 (1957), rather:

> The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial . . . . And we construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate. If the discrimination complained of does not, cannot and will not have the desired effect of injury to or substantial lessening of competition, or tendency to create a monopoly, the Act has not been violated . . . . This is implicit in the very language employed by the Act. Any other construction would turn the Act into a price control law contrary to its manifest purpose. We do not mean to suggest that the Act may be violated a little without fear of its sanctions but rather that insignificant "violations" are not, in fact or in law, violations as defined by the Act.

Whitaker, supra, at 256.

In *Corn Products Co.* v. *F.T.C.*, 324 U.S. 726 (1944), the Supreme Court tried to define the necessary effect on

competition a practice must have to constitute a violation of the Act:

> It is to be observed that [the Act] does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipiency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect . . . . The use of the word "may" was not to prohibit discriminations having "the mere possibility" of those consequences, but to reach those which would probably have the defined effect on competition.

Corn Products, supra, at 738.

Finally, it should be noted that under the Robinson-Patman Act the test is injury to competition, not merely injury to a competitor, *Standard Motor Products, Inc.* v. *F.T.C.*, 265 F.2d 674 (2d Cir. 1959), *cert. den.* 361 U.S. 826 (1959); *Lloyd A. Fry Roofing Co.* v. *F.T.C.*, 371 F.2d 277 (7th Cir. 1966), and the effect on competition must be substantial, *United Biscuit Company* v. *F.T.C.*, 350 F.2d 615, 621 (7th Cir. 1965), *cert. den.* 383 U.S. 926; *Whitaker, supra.*

Marty's attempts to prove injury to competition by showing that the stipulated invoice prices charged to it were higer than those charge to its competitors, that the cost of tile is a large part of any bid, that the market was very competitive, and that Marty's had a drastic decrease in the percentage of bids won since 1975. GAF does not consider the price differences here substantial. GAF also disputes the effect of its tile prices alone on Marty's competitive position because there are several differnt costs that go into a bid, e.g., labor, freight, profit margin, and cost of carpet and other products used on the job, and GAF contends that a bid could have been lost on account of any one of them. GAF also claims the testimony of Albert Thomas, a general

contractor in the D.C. area, shows Marty's has remained competitive over the last several years. There is no credible showing that GAF's prices had a discernable effect on plaintiff's bids for contract tile work and its competitors' bids, and that any such bid differences were the result of price differences.

The Court will first analyze the stipulated invoice prices from Norman Deitch to Marty's and its competitors as set out in stipulations 32 and 33.

CHART 1

3/32" vinyl asbestos tile

1975 Marty's Invoice Price: $9.06

competitor	its invoice price(s)	% less than Marty's[1]
Fairfax Tile	$ 9.34/9.18/8.80	-3, -1, 3
*Hudson Supply	8.80	3
S. E. Floors	10.26/8.80	-13, 3
So. Floors & Accoustics	10.25/9.31	-13, -3
*Standard Floors	9.34/9.03/8.80[2/]	-3, 0, 3
Tri-State	8.98	1

1976 Marty's Invoice Price: $8.80

competitor	its invoice price(s)	% less than Marty's
*Fairfax Tile	$ 8.80[2]/8.43	0.4
S. E. Floors	8.80	0
So. Floors & Accoustics	8.80	0
Standard Floors	8.80	0

1977 Marty's Invoice Prices: $8.43[2] (March), $8.68 (May), $8.61 (August)

competitor	its invoice price	% less than Marty's
*Fairfax Tile	$ 8.43 (all year)	0.3
Hudson Supply	8.43 (May)	3
So. Floors & Accoustics	8.68 (August)	0
Tri-State	8.80 (March & May)	-4, -1

CHART 2

1/8" vinyl asbestos tile

1975 Marty's Invoice Price: $10.84

competitor	its invoice price(s)	% less than Marty's[1]
*Fairfax Tile	$ 10.52	3
*Hudson Supply	10.52	3
*S. E. Floors	10.52[2]/7.74	3, 25
So. Floors & Accoustics	12.09/11.13/10.75	-12, -3, 0.7
*Standard Floors	10.52	3
*Tri-State	10.75/10.52	0.7, 3

1976 Marty's Invoice Price: $10.52

competitor	its invoice price	% less than Marty's
*Fairfax Tile	$ 10.52[2]/10.15	0, 3.6
*Hudson Supply	10.52	0
*S. E. Floors	10.52/10.15[2]	0, 3.6
* So. Floors & Accoustics	10.52	0
* Standard Floors	10.52	0
Tri-State	10.52	0

1977 Marty's Invoice Price: $10.30

competitor	its invoice price	% less than Marty's
*Fairfax Tile	$ 10.25	0.5
Hudson Supply	10.30	0
*S. E. Floors	10.15	1.5
So. Floors & Accoustics	10.45	-1.5
Standard Floors	10.52	-2
Tri-State	10.52	-2

1/ A negative percentage indicates the competitor was invoiced that much more than Marty's.

2/ This price was on most of the invoices for the year.

* More than five invoice prices for the year are given in the stipulations.

Chart 1 reveals that in 1975 only Hudson Supply and Standard Floors received lower invoice prices on 3/32" tile than Marty's. For the most part, Marty's other competitors paid more that year. In 1976 and 1977 the prices were all very similar except that Fairfax Tile got lower prices for the latter half of 1977.

Chart 2 shows that in 1975 almost all of Marty's competitors were invoiced 3% less than Marty's for 1/8" vinyl asbestos tile from Deitch. In 1976, Southeastern Floors was the only competitor to receive a cheaper price, 3.6% less. Fairfax Tile received this same 3.6% lower price on only three of eighteen invoices, and the testimony of George Frank, President of Fairfax Tile, established that Spurgeon gave him these prices in an effort to meet competition. All other competitors in 1976 received the same invoice prices Marty's received. In 1977, again only Southeastern Floors and Fairfax Tile received prices lower than Marty's, but the differentials were only 1.5% and 0.5% respectively. The prices given to Marty's other competitors were either the same as Marty's or were higher.

There were not enough 1974 invoice prices given for

Marty's competitors to prove any consistent price discrimination. For 1/8" tile, the only invoice price given is for $9.96 to Hudson Supply on August 26. No prices are given for any of the other competitors. For 3/32" tile, Fairfax Tile received a price of $7.80 for three invoices dated August 1, August 7, and October 17. Southern Floors & Accoustics got the following prices: $6.39 (June 28), $7.80 (August 20, November 11 and 13, and December 12), and $9.88 (December 13). Throughout August, Marty's was paying $7.60, and from September until year end $8.72. Thus Marty's received prices lower than Fairfax Tile two times out of three, and they received prices lower than Southern Floors three times out of six.

As for the importance of the tile prices in the total bid, Spurgeon testified that it would average around 40%. Martin Adem, President of Marty's, said it could be as low as 35% or as high as 70%. Thus an extra 3% paid by Marty's might affect its bids from around 1 to 2%. The price of tile, however, is only a part of the total bid. Almost all of the bids the plaintiff claims to have lost because of tile price also included the installation of carpet, and on many of the bids the carpet accounted for most of the total. Mrs. Adem testified that on a combined bid it would be impossible to determine whether the bid was lost because of tile or carpet. The evidence heard at trial also showed Marty's would vary its man-day cost of labor and would charge profit margins commonly ranging from 15-25% and occasionally from 30-40%.

Entries from plaintiff's Exhibit 1225-A show the wide range of profit margins on jobs of similar size:

			BID			PROFIT			
Page	Date	Job Name	Tile	Carpet	Combined	Tile	%	Carpet	%
BL-1	3/2/76	Frank's Hardware	$8898	$ —	$8898	$1525	21	$ --	--
BL-1	12/7/76	Science Labs O.C. Schools	7200	1700	8800	1115	18	268	19
BL-8	8/16/74	Neelsville Presby. Church	2085	6128	8200	376	22	1105	22
BL-11	5/29/75	Bldg. #25 NASA	9671	--	9600	1262	15	--	--
BL-13	3/23/76	Bauer Dr. Rec. Center	3993	5688	9338	680	21	948	20
BL-19	7/26/77	Comm. Center Swim Pool	9519	--	9339	1452	18	--	--

Certainly a rise in the cost of any ingredient used in making a finished product will have some effect on the cost of that finished product, and thus on competition. In this case, the Court believes there are too many other variables and possibilities involved to conclude that any discriminatory tile prices to Marty's have a reasonable probability of substantially lessening competition in this market. *Corn Products* v. *F.T.C., supra; Minneapolis-Honeywell Regulator Co.* v. *F.T.C.*, 191 F.2d 786 (7th Cir. 1951). The higher prices would, of course, have a greater effect on Marty's individually than it would on the D.C. market, but the Act is concerned with competition, not competitors. *Standard Motor Products, supra; Lloyd A. Fry Roofing, supra.*

Support for this conclusion can be found in the testimony of Albert Thomas, the only general contractor in the D.C. area who was a witness at trial. Thomas testified that he generally receives bids from more companies in whose favor Marty's claims GAF discriminated. When asked how much of his work Marty's received, Thomas said 50-60%, and that the remaining 40-50% was split up among Marty's competitors. His testimony also indicated that the volume of his work Marty's wins has been 50-60% for the past year to three years.

Finally, Frank Harrison, one of Marty's estimators, tes-

tified about the decline in the percentage of bids Marty's won from 1974-76. He said they won 25% in 1974, 10-12% in 1975, and 8% in 1976. Reference to the price discrimination charts 1 and 2 shows the worst discrimination in invoice prices occurred in 1975. In 1976 Marty's was receiving invoice prices much less discriminatory than those of 1975, in fact they were the same as those received by most competitors, yet Harrison's testimony is that 1976 was a much worse year for Marty's than was 1975. The inference to be drawn from this is that something other than the price of tile was responsible for the decline in Marty's business.

Plaintiff's exhibit 1217 corroborates this conclusion. It shows that Marty's tile sales were even lower for 1977 than they were for 1976.

CONTRACT SALES

	Carpet	Tile
1971	$ 855,620	$ 651,932
1972	911,148	836,227
1973	806,940	819,809
1974	897,303	639,892
1975	1,425,711	639,233
1976	884,428	461,527
1977	1,057,032*	390,751*

* 1977 figures are estimates calculated by doubling the sales for the first two quarters.

Although tile sales have declined every year since 1973, Marty's alleges that GAF sold to it at higher prices for the most part only in 1974 and 1975. The continuing decline

over the past two years is not attributed to price discrimination, in fact, it is not explained at all. The Court recognizes that there is a delay of perhaps a year between the bid and the installation and thus the effect of alleged discriminatory prices in one year might not show itself until the next year, but with the worst discrimination occurring in 1975, it would be expected that 1977 sales should begin to improve. Here they got worse.

The plaintiff in an antitrust action 'need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury," *Zenith Corp.* v. *Hazeltine,* 395 U.S. 100, 114, n. 9, but this unabated decline in Marty's tile sales since 1973 leads the Court to believe that any price discrimination that may have occurred was not a "material cause" or "substantial factor" in bringing about the damage. *Zenith Corp., supra; Billy Baxter, Inc.* v. *Coca-Cola Co.,* 431 F.2d 183 (2d Cir. 1970), *cert. den.* 401 U.S. 923, *reh. den.* 401 U.S. 1014.

GAF claims that even if the Court should find a violation of the Robinson-Patman Act because of price discrimination, they are excused because of the affirmative defense of meeting competition. *Standard Oil Company* v. *F.T.C.,* 340 U.S. 231 (1951). The President of Fairfax Tile testified that his $10.15 price in 1976 on 1/8" vinyl asbestos tile was given by Spurgeon to meet competition. Defendant's exhibits 151-153 establish that the lower prices received by Fairfax Tile for 3/32" tile in 1976 and for both tiles in 1977 were in response to competition. Defendant's exhibit 253 proves the same for 1/8" tile for Southeastern Floors in 1976. See stipulation 36. There was considerable evidence that prices were given to meet competition, and it is established that GAF, like others, gave lower prices to some customers on occasions to meet the competition of other manufacturers. It is a question of good faith; GAF must act as a prudent businessman and respond to what he

believes is a situation of competitive necessity. *See F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

II

Plaintiff's second claim for damages arises under 15 U.S.C. §13(d), which, among other things, prohibits any person engaged in commerce from paying anything of value to any one of his customers for services furnished by the customer in connection with the sale of such person's goods unless such a payment is available to all customers on equal terms. The plaintiff claims to have been discriminated against because GAF's cooperative advertising program was made available to the plaintiff's competitors, but not to the plaintiff. Interesting questions are raised about the legal effect of the Federal Trade Commission's "Guides for Advertising Allowances," 16 C.F.R. Part 246, but the Court believes the issue can be resolved without answering those questions.

The cooperative advertising program was begun in 1974, and by its terms GAF agreed to pay 50% of the retailer's advertising costs, but payments were not to exceed 3% of the retailer's purchases. The defendant's exhibits (206-210) describe the program list as "qualifying media:" newspapers, radio, television, direct mail, and more recently newspaper inserts. Plaintiff's exhibit 1200 gives the totals for plaintiff's advertising expenses since 1973. Defendant's exhibit 738 breaks down the total to show how the advertising money was spent. Most of the money was spent for advertising in the yellow pages of the telephone book, which is not a qualifying medium. The plaintiff offered exhibits 1197-8 to try to prove that cooperative advertising did include advertising in the yellow pages. These two exhibits are credit memoranda from GAF to Deitch. Deitch is GAF's distributor, not a retailer, and thus not eligible to participate in the program. (See defendant's exhibits 206-

210). Assuming, however that Deitch did participate in the program, §13(d) requires that buyers be treated equally only when they are "competing on the same functional level," *F.T.C.* v. *Fred Mayer, Inc.*, 390 U.S. 341, 356 (1967). Deitch and Marty's do not compete on the same functional level, and thus any evidence that Deitch received payments from GAF for advertising in the telephone book is irrelevant in the proof of the plaintiff's claim that GAF has discriminated against it by not paying for its yellow pages advertising while doing so for its competitors. The plaintiff has offered no evidence whatsoever that GAF paid any of the plaintiff's competitors for yellow pages advertising, and so it has not met its burden of proof.

The plaintiff's other advertising expenses were for classified "Help Wanted" advertisements in newspapers. These advertisements are not covered by the defendant's program. As none of the plaintiff's advertising expenses were qualified under the defendant's plan, the plaintiff was entitled to no reimbursement from the defendant, and thus was not discriminated against.

Plaintiff complains that the program was not fully explained to it. It was told of the program, and it was available. Nothing further was required. *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F.3d 480, 485 (2d Cir. 1962).

III

The third claim is for breach of contract. Marty's has purchased considerable GAF tile for use in its jobs since 1966. It primarily used GAF products on its jobs unless another brand was requested. It making its bids, Marty's would get a price quotation from Spurgeon. If Marty's won the contract it would order the tile from GAF at the quoted price and GAF would give price protection on the contract for a period of time, usually about a year.

Marty's claims Spurgeon guaranteed the price protection for the length of the contract. But the company's established policy before 1974 was to give price protection for only one year even though there was some understanding in the market that price protection should be in effect for the length of the contract. In any event the question became academic because all price increases between 1966 and 1973 were rescinded and the price quoted adhered to.

In late 1973 Spurgeon learned there were going to be drastic price increases and a shortage of materials. He gave this information to his customers, including Marty's, and the price protection as they had known it in the past was gone, but that "We would endeavor to price-protect for six months all existing contracts that we could ship within that six-month period," (Tr. of Ev. p. 340); that "in no uncertain terms this was it; there would be no extensions, and that there would be drastic price increases." (Id. p. 340). Spurgeon was present when Mueller also told Marty's about the price increase and the termination of price protection. The evidence is clear Marty's was advised of the change for the period beginning in January 1974.

The evidence establishes that GAF met all of its commitments and undertakings for the period prior to January 1, 1974, and its commitments made thereafter. There was no binding contract between Marty's and GAF for furnishing tile at any price or quantity after June 1974, except as agreed on for a particular job. Plaintiff not only admitted GAF lived up to the undertaking and did price-protect for the first six months of 1974 all existing contracts, but the evidence and plaintiff's actions establish there was no contract by GAF for any price protection after July 1, 1974, for it paid the increased price after that date without protest.

Marty's alleges damages of $124,603.29, the difference between the prices allegedly quoted to Marty's and the

prices Marty's actually paid. Marty's claims the contract was formed orally and by the conduct and course of dealing of the parties. The price quotation, it is argued, was the offer, and Marty's seems to assert that the use of the quotation in the bid was an acceptance. The formation of the contract was contingent on Marty's receiving the installation contract from the general contractor.

The Uniform Commercial Code has greatly liberalized the law of sales, but it has not done away with the concept of consideration. The use of Spurgeon's alleged quotation in a bid submitted by Marty's was not the acceptance of an offer creating a contract because even if Marty's won the contract they would not have been required to use GAF tile. If after being awarded a contract Marty's had decided to use the tile of one of GAF's competitors, GAF certainly would not have had a breach of contract claim against Marty's. Spurgeon's alleged price quotation was not an offer, it was nothing more than an invitation to deal. *See Thomas J. Sheehan Co.* v. *Crane Co.*, 418 F.2d 642, 645-6 (8th Cir. 1969).

A contract between Marty's and GAF existed when Marty's placed an order for tile for a certain job and GAF accepted that order. Such contract would be shown by Marty's purchase order and GAF's acceptance or invoice. Under *Virginia Code* §8.2-202(a), such written memoranda could be supplemented by a course of dealing between the parties. The course of dealing shows that on a job on which Marty's used GAF tile it used GAF tile exclusively and the price would be protected for at least one year. But this is subject to the new terms which went into effect after the second week in December 1973. Thus, assuming the right of Marty's to the price quoted when the first order was placed on a job before the second week in December 1973 (when the old price protection policy was changed), and the job was not completed prior to June 30, 1974

(the end of the six-month price protection new policy), the evidence presented at trial does not allow the Court to determine how much, if any, of the claimed $124,603.29 in damages would be allocated to such contracts, and it would be nothing more than speculation for the Court to try to arrive at a figure due on such contracts.

IV

The fourth cause of action in the complaint asserts that GAF through Spurgeon made certain misrepresentations upon which Marty's relied and that the reliance caused Marty's substantial damages. The general rule on fraud and misrepresentation in Virginia is:

> The law is well settled that if one represents as true what is really false, in such a way as to induce a reasonable man to believe it, and the representation is meant to be acted on; and he to whom the representation is made, believing it to be true, acts on it, and in consequence thereof sustains damage—there is such fraud as will support an action for deceit at law . . . . Whether the representation is made innocently or knowingly, if acted on the effect is the same. In the one case the fraud is constructive; in the other it is actual. *Mears* v. *Accomac Banking Co., Inc.*, 160 Va. 311, 321, 168 S.E. 740, 743 (1933).

Marty's claims three misrepresentations were made by GAF. It says that in 1974 Spurgeon told the Adems that price protection on jobs would continue without a cutoff date when actually it was scheduled to last only six months. But the Court finds such representation was not made and that Marty's was told about the cutoff date. "The general rule is that fraud must relate to a present or pre-existing fact and cannot ordinarily be predicted on unfulfilled promises or statements as to future events." *Soble* v. *Herman*, 175 Va. 489, 500, 9 S.E.2d 459, 464 (1940). Hence, even if Spurgeon had made such representations, they were

as to future events, but even assuming they were not, fraud is never presumed, but must be strictly and clearly proved as alleged. *Poe* v. *Voss*, 196 Va. 821, 86 S.E.2d 47 (1955). The evidence must be clear and convincing. *Cary* v. *Harris*, 120 Va. 252, 91 S.E. 166 (1917). The plaintiff has not carried the burden of proof here. Spurgeon told plaintiff that GAF was not the only manufacturer changing its policy, that GAF's competitors were doing likewise, and news of the changes was carried in trade publications. Spurgeon was well aware of the problems in the tile industry caused by the oil embargo, and well aware of the reporting of those problems in the media, and having been told his company was changing its policy, the Court finds that Spurgeon did not make any representation that price protection on jobs would continue beyond June 1974.

The second alleged misrepresentation was said to have been Spurgeon's statement to the Adems that GAF owned a copolymer plant in Mexico. GAF does not own such a plant. The tile shortage was not caused by the lack of a plant, but rather by the oil embargo. The embargo caused shortages in the raw materials needed to make copolymer, so even if GAF had owned a copolymer plant, they would not have been able to produce copolymer without the raw materials. Thus the oil embargo, not GAF's want of a plant was the cause of the tile shortage. "The ground of the action of deceit is fraud and damage, and when both concur the action will lie." *Lloyd* v. *Smith*, 150 Va. 132, 142 S.E. 363, 367 (1928). The Court does not believe such representation was made.

The last purported misrepresentation was alleged to be a statement by Spurgeon that Marty's was receiving the "lowest prices around," and again, "the lowest price that's available." GAF says that if this statement was made, it was puffing, and as such does not constitute fraud, *Henning* v. *Kyle*, 190 Va. 247, 56 S.E.2d 67 (1949), however, "an

opinion may amount to an affirmation and be the inducement to a contract, especially when the parties are not dealing on equal terms, and one of them has information not equally open to the others." *Grim* v. *Byrd*, 73 Va. (32 Gratt.) 293, 301 (1879). This alleged statement does not fall in that class. In *Grim* stock in an insolvent company was traded for real property. The stock was worthless and known to be so by Byrd. Byrd had represented the company owed $60,000.00, but had been offered $100,000.00 for the property; that it was going to declare a dividend on what it had earned that year, all of which was false. The representation were of facts and not merely of opinions. In the more recent case of *Piedmont Trust Bank* v. *Aetna Casualty & Surety Co.*, 210 Va. 396, 171 S.E.2d 264, 267 (1969), the opinion said:

> It is regarded as fundamental that fraud cannot be predicated upon what amounts to a mere expression of an opinion. *Henning* v. *Kyle*, 190 Va. 247, 252, 56 S.E.2d 67, 69 (1949), *Poe* v. *Voss*, 196 Va. 821, 825, 86 S.E.2d 47, 49 (1955).

Even if Spurgeon's statements were more than trade talk, Marty's could easily have determined if GAF's price was the lowest by calling the distributors for GAF's competitors. This information was as available to Marty's as it was to Spurgeon.

V

In the fifth ground for recovery, Marty's seeks relief under the doctrine of equitable estoppel for the same statements made by Spurgeon for which it sought damages on the theory of misrepresentation in part IV. Like fraud, "where a party relies on the doctrine of estoppel, he must prove his claim by clear, precise, and unequivocal evidence." *Maxey* v. *Doe*, 217 Va. 22, 225 S.E.2d 359 (1976). The elements for estoppel are:

> (1) There must have been a false representation or concealment of material facts; (2) the representation

> must have been made with the knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it.

Trayer v. *Bristol Parking*, 198 Va. 595, 95 S.E.2d 224, 231 (1956); *American Security and Trust Co.* v. *Fletcher*, 490 F.2d 481, 485 (4th Cir. 1974).

As to the statements about price protection, for the same reasons given in part IV, the Court finds the statement was not made, and plaintiff has not met its burden of proof.

There was no evidence that Spurgeon knew there was not a copolymer plant in Mexico [nor is there evidence that one is not there], thus the second element is not satisfied. Even had it been proved that he knew it to be a false statement, for the reasons stated in part IV, the reliance on the statement was not the cause of the injury, and "it is of the essence of estoppel that the act relied upon . . . should have been injurious, and to the prejudice of him who relies upon it as estoppel." *Smith's Ex'r* v. *Powell*, 98 Va. 431, 30 S.E. 522 (1900).

Concerning Spurgeon's statements that Marty's was getting the "lowest prices around," or "the lowest prices that's available," the rule of equal availability of information applies to actions in estoppel as well as misrepresentation. *Lindsey* v. *Clark*, 193 Va. 522, 69 S.E.2d 342 (1952).

VI

In the last count, Marty's alleges a violation of the Sherman Antitrust Act, 15 U.S.C. §1, in that GAF engaged in a resale price maintenance scheme that was a per se violation of the Act as interpreted by *U.S.* v. *Parke, Davis Co.*, 362 U.S. 29 (1960), and *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968). Resale price maintenance cases are

usually brought by distributors or retailers who have been forced to follow a minimum or maximum price schedule established by the supplier. The arrangement here is not at all similar to the usual case.

For almost ten years beginning in 1966 Marty's bought directly from GAF. After May 30, 1975, Spurgeon still quoted the prices directly to Marty's as he had done before that date, but now the quoted price was determined after conference with Deitch, and the tile was still shipped directly to Marty's or to the job site. GAF would invoice Deitch for the price of the tile less an agreed upon percentage. Marty's would pay Deitch the price quoted by Spurgeon.

Although Deitch is an independent company and actually buys the goods from GAF, the role of Deitch in the relationship between Marty's and GAF seems to be merely that of a factor or discounter. GAF sets the price and delivers the goods to Marty's. GAF bills Deitch for the goods less a discount and then Deitch is entitled to bill Marty's at the quoted price. It is as though Deitch bought the contract between GAF and Marty's for a discount. The pre-1975 arrangement has been changed only to the extent that Deitch now does the billing.

There was no violation of the Sherman Act when Marty's bought directly from GAF, and Deitch's handling of the billing could not make this an antitrust violation. Nor is there any apparent anti-competitive effect. Spurgeon goes to Marty's and quotes a price he thinks the market will bear. He oftentimes talks to Kaulkin of Dietch to get additional information on local market conditions. The prices charged to Marty's did not rise on June 1, 1975. Perhaps Deitch has some complaint about this method of doing business, but the Court does not believe Marty's does.

While plaintiff alleges that GAF contracted, combined

and conspired with its distributor Deitch to fix and maintain the price charged to plaintiff, the evidence clearly establishes the contrary to be true. There was no resale price maintenance as a form of price fixing or any infringement upon a purchaser's freedom to resell. By no stretch of the imagination does the evidence establish any conspiracy or joint undertaking with a common purpose to accomplish an unlawful end by any unlawful means. Nor is there evidence that GAF fixed or maintained the resale price charged by its distributor, nor that GAF sought to compel Deitch to comply with any resale price maintenance policy. There is no merit to this contention.

Plaintiff has failed to establish it is entitled to the relief prayed for. The complaint is therefore DISMISSED.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
May 3rd, 1978.

APPENDIX B

Unpublished Opinion

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 77-237-A

MARTY'S FLOOR COVERING CO., INC.,
Plaintiff.

vs.

GAF CORPORATION,
Defendant.

MEMORANDUM ORDER

This matter was tried in the Alexandria Division of this Court on November 14, 15 and 16, 1977 before Judge Richard B. Kellam without a jury. After trial, at the request of counsel, the matter was continued to allow the record to be transcribed, briefs were then presented and final argument held. Judge Kellam rendered his Memorandum Opinion and Order on May 3, 1978, finding in favor of the defendant, GAF Corporation.

Thereafter, plaintiff filed a Motion for a New Trial seeking to have Judge Kellam to now recuse himself and to order a new trial on all issues. The motion is grounded upon an affidavit that a hardware store and building supply firm in Virginia Beach, Virginia, named Kellam and Eaton, Incorporated, which is not a party to this suit, sells some

GAF products. Judge Kellam was an officer and director of Kellam and Eaton, Incorporated from 1930 to 1940. It is alleged that this is evidence of possible bias or prejudice to be laid to Judge Kellam.

The parties were invited to file briefs and an oral hearing was held on June 6, 1978.

Plaintiff relies upon 28 U.S.C. §144 and 28 U.S.C. §455. At the oral hearing Judge Kellam, in an abundance of caution, stepped aside and requested Judge John A. MacKenzie of the Eastern District of Virginia to preside at the hearing.

FINDINGS OF FACT

1. Kellam and Eaton, Incorporated began as a country grocery store in 1930. Some time later, it added a retail hardware line and became a distributor of building products in Virginia Beach, Virginia. Kellam and Eaton, Incorporated is not a party to this suit, nor has it any connection therewith. Kellam and Eaton has, from time to time, been a distributor of floor tile manufactured by GAF Corporation. An Affidavit filed by the local GAF floor tile distributor shows that Kellam and Eaton has handled about $1200.00 worth of GAF products during the four year period of 1974-1978.

2. Judge Richard B. Kellam, now Chief Judge of the Eastern District of Virginia, was an original incorporator of his brother's business, Kellam and Eaton, Incorporated, when it opened as a grocery business in 1930, owned and operated by Frank W. Kellam. Richard Kellam served as a member of the Board of Directors until 1940, and has had no connection with Kellam and Eaton in any capacity since that date. He has never owned any stock or had any interest of any kind in Kellam and Eaton, Incorporated. Any floor tile or any GAF products sold by Kellam and

Eaton has occurred since Richard Kellam ceased all connection therewith in 1940.

3. Judge Kellam voluntarily testified at the hearing on June 6. He invited cross-examination of counsel. Counsel for plaintiff accepted that offer. He stated that he had had absolutely no connection with Kellam and Eaton, Incorporated since 1940. In the period when he served as a Director in his brother's business, it was a grocery store only. No GAF products were in the grocery inventory of Kellam and Eaton in 1940, or before.

4. Judge Kellam testified, and we so find, that he has no knowledge of any products that Kellam and Eaton sells which are manufactured by GAF Corporation. An Affidavit introduced in the case indicates that Kellam and Eaton, Incorporated, between February 1974 and May 1978, a period of approximately four years has handled $1212.00 worth of GAF products.

5. The owner of Kellam and Eaton, Incorporated, Frank W. Kellam, brother to Judge Richard B. Kellam, and employees of that corporation include sons of Frank W. Kellam and nephews of Richard B. Kellam, but no members of the immediate family or household of Richard B. Kellam are there employed.

CONCLUSIONS OF LAW

1. 18 U.S.C. §455 provides "that any judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party and his attorney as to render it improper, in his opinion, for him to sit on the trial . . . ." In this case, Judge Kellam has indicated under oath that he has no interest of any kind with any party to this suit, has never been a material witness in any matter related to this suit, is not

related to or connected with any party or his attorney in this suit, and that in his opinion, there is no reason to disqualify himself. He agrees that his brother owns and runs a hardware business which sells floor tile, but whether any such tile is manufactured by GAF Corporation, he does not know.

2. We have reviewed the affidavits and testimony and find no reason for Judge Kellam to have disqualified himself and yet, in an abundance of caution, he has stepped aside and asked this associate judge to hear the matter and make an independent finding.

We find that Judge Richard B. Kellam has had no ownership interest, stock or otherwise, in Kellam and Eaton, Incorporated; that he served as a director in his brother's business from 1930 to 1940; that he has no knowledge of any building materials sold by Kellam and Eaton, Incorporated manufactured by GAF Corporation. We further find that Judge Richard B. Kellam has no interest in this litigation; has no connection with any party or counsel with this litigation, and that it was, and is, in no wise improper for him to have heard and determined the matters in issue.

Upon review of this file, the pleadings, the motions for a new trial, and affidavits submitted therewith, and after listening patiently to argument of counsel, it is the considered judgment of this Court, for the reasons stated above, that the motion for a new trial is absolutely devoid of any reason whatsoever.

The motion for a new trial is DENIED.

It is so ORDERED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 8, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1603

MARTY'S FLOOR COVERING CO., INC.,
Appellant,

vs.

GAF CORPORATION,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia

Argued June 4, 1979 Decided July 19, 1979

Before HALL and PHILLIPS, Circuit Judges and

DUMBAULD* Senior District Judge

Christopher M. Kerns (J. Thomas Burch, Jr., Leslie Yu Burch, Kerns and Klimek on brief) for Appellant; John D. Field, III (Catherine T. Porter, Leslie H. Wiesenfelder, Dow, Lohnes and Albertson; Edward D. Tanenhaus, Associate Counsel, GAF Corporation on brief) for appellee.

DUMBAULD, Senior District Judge

This private antitrust case is complicated by an issue concerning the propriety of the trial judge's participation

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* Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

in the case. The case was tried non-jury before Chief Judge Richard B. Kellam, of the Eastern District of Virginia, who found for defendant. The case involved purchase of tile by plaintiff from defendant. After losing the case, plaintiff sought a new trial and recusal of the judge, on the ground that almost 50 years ago the judge when working in his brother's law office had been one of the incorporators of Kellam & Eaton, Inc., a company doing business in Princess Anne (Virginia Beach) at the time of the trial, and owned by the judge's brother, and dealing in tile manufactured by defendant. The judge was an officer and director of Kellam & Eaton from 1930 to 1940. He never had any financial interest in the business.

Upon the filing of the motion for new trial and affidavit of prejudice, Judge Kellam recused himself from further participation in the case, which was assigned to Judge John A. MacKenzie. Judge MacKenzie held a hearing, at which he took the testimony of Judge Kellam, and after making appropriate findings of fact, concluded that "the motion for a new trial is absolutely devoid of any reason whatever," and denied the same.

Plaintiff in support of its motion relied on 28 U.S.C. 144 and 28 U.S.C. 455.

The former section provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
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> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The issue under the above section is moot in the case at bar, since Judge Kellam's voluntary action afforded plaintiff all the relief which would have been obtainable under 28 U.S.C. 144: "such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

The usual procedure under this section is described as follows in *U.S.* v. *Nehas,* 368 F.Supp. 435, 437 (W.D. Pa . 1973):

> In accordance with the language of the statute, and cases construing it, the following procedure is to be observed. The filing of the affidavit does not itself automatically effect the ouster. Instead the legal sufficiency of the facts alleged (as distinguished from conclusionary assertions) must be passed upon by the target judge. He accepts as true the facts alleged, as on a common law demurrer, and determines merely their legal adequacy. He does not determine the truth of the allegations. In fact no one ever passes upon the truthfulness of the allegations. As stated by Judge Yankwich in *Cole* v. *Loew's Inc.,* 76 F.Supp 872, 877 (S.D. Cal. 1948), "the truth of the affidavit cannot be adjudicated by the judge involved or anyone else." If the target judge finds them legally sufficient, *then* the disqualification is automatically effected. His determination is an interlocutory ruling reviewable on appeal along with other alleged errors in connection with the trial.

Only prospective relief is afforded by this section. It can not be used as a means of obtaining a new trial. Doubtless if the facts disclosed in a proceeding under the section showed such a lack of fundamental fairness as to vitiate

the trial under the due process clause, a new trial could be had on constitutional grounds independently of 28 U.S. 144; but no such contention has been advanced in the case at bar.

Plaintiff's strongest point is the "Caesar's wife" principle embodied in 28 U.S.C. 455 (as amended in 1974):

> "Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

None of the specific grounds for disqualification subsequently specified in 28 U.S.C. 455 have any pertinence to the case at bar.

But we are unable to conclude that the facts demonstrated here provide the slightest ground for reasonably questioning Judge Kellam's impartiality. He never had any financial interest in Kellam & Eaton. His connection as officer or counsel ceased in 1940. He had no knowledge that the company dealt in defendant's tile (such dealings amounted to only $1212.00 between February 1974 and May 1978). Without accepting Judge MacKenzie's characterization of the contention as something "that comes as close to being ridiculous . . . as anything I ever heard," it suffices to say that no adequate or substantial grounds for granting a new trial have been shown.

We pass, then, to the merits of the trial court's conclusions on the antitrust issues involved in the case.

Appellant's most plausible contention is that defendant's mode of doing business through Norman Deitch of Maryland, Inc. (Deitch) amounts to resale price maintenance in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. But upon careful consideration of the facts in the case at bar, and penetrating form in search of substance, we con-

clude that the trial judge was correct in finding no antitrust violation here.

Resale price maintenance is of course a violation of the Sherman Act. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373, 404-408 (1911); *U.S.* v. *Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960). Cf. *U.S.* v. *General Electric Co.*, 272 U.S. 476, 488 (1926); and *Continental T.V., Inc.* v *GTE Sylvania, Inc.*, 433 U.S. 36, 57 (1977).

Superficially the record would support a finding that resale price maintenance exists. The parties stipulated that Deitch was "defendant's distributor" and that plaintiff was one of Deitch's "customers." Thus there was perhaps a technical transfer of title to the tile sold from defendant to Deitch and then from Deitch to plaintiff.[1] It is uncontested that defendant actually controlled and quoted the prices paid by plaintiff through defendant's sales representative Robert Spurgeon. Spurgeon continued to quote the prices after defendant began in May 1975 its arrangement with Deitch, just as he had in earlier years when plaintiff's purchases were made directly from defendant. The product continued to be shipped directly from defendant to plaintiff, and Deitch's billing was required to be in conformity with Spurgeon's quotations.

Looking to the substance of the parties' dealings rather than merely to form, it seems clear that defendant was in fact continuing to sell its tile to plaintiff and might properly quote the prices at which it wished to sell to plaintiff. As the trial court found, Deitz's function was "merely that of a factor or discounter." The trial court further found that

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[1] However, especially since *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 52, 57 (1977), one should be mindful of the comment of Justice Holmes that " 'Commerce among the several States' is a practical conception, not drawn from the 'witty diversities' (Yelv., 33) of the law of sales." *Rearick* v. *Pennsylvania*, 203 U.S. 507, 512 (1906).

"It is as though Deitch bought the contract between GAF and Marty's for a discount. The pre-1975 arrangement has been changed only to the extent that Deitch now does the billing." In other words, the situation resembles a purchase by Deitch of defendant's accounts receivable at a discount, from which it makes its profit when collections are received. The arrangement simply seems to be a matter of convenience, just as some banks with idle computer facilities undertake billing and collection for drug stores and similar retail businesses not wishing to invest in expensive modern equipment.

Consequently we conclude that the charge of retail price maintenance is not substantiated.

Appellant's contentions under the Robinson-Patman act fare no better. It is first asserted that defendant engaged in price discrimination in violation of 15 U.S.C. 13(a), which provides that:

> It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided* . . . That nothing herein contained shall prevent price changes from time to time . . . in response to changing conditions affecting the market . . .

The trial court's analysis of the evidence in the case at bar shows only trifling fluctuations from time to time between prices charged plaintiff and other purchasers from defendant. These normal responses to market conditions are far removed from the pattern of discriminatory practices in favor of chain stores and to the detriment of small

shopkeepers which led to enactment of the Robinson-Patman act.

As the trial court also emphasized, there was no sufficient proof of causation affecting competition on plaintiff's part. The price of tile is only a part of the total bid, and on many of plaintiff's bids installation of carpet was a major factor. As the trial court noted: "Certainly a rise in the cost of any ingredient used in making a finished product will have some effect on the cost of that finished product, and thus on competition. In this case, the Court believes there are too many other variables and possibilities involved to conclude that any discriminatory tile prices to Marty's have a reasonable probability of substantially lessening competition in this market." We agree.

Likewise the trial court's findings, which we are unable to say are "clearly erroneous" [FRCP Rule 52(a)], dispose of appellant's contention that defendant violated 15 U.S.C. 13(d), with respect to a cooperative advertising program. That provision makes it unlawful

> "to pay . . . for . . . anything of value to or for the benefit of a customer . . . unless such payment . . . is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

The trial court found: "The plaintiff has offered no evidence whatsoever that GAF paid any of the plaintiff's competitors for yellow pages advertising, and so it has not met its burden of proof." [2] Plaintiff's other advertising expenses (for "help wanted"), did not fall within defendant's program. Thus the trial court concluded: "As none of plain-

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[2] If Deitch were paid for yellow pages advertising, there would be no violation since Deitch and plaintiff do not compete "on the same functional level." *FTC* v. *Fred Meyer Inc.*, 390 U.S. 341,356 (1968).

tiff's advertising expenses were qualified under the defendant's plan, the plaintiff was entitled to no reimbursement from the defendant, and thus was not discriminated against." Any contradiction in the testimony regarding the extent to which defendant explained its advertising program to plaintiff was resolved by the determination of the trier of fact that "It was told of the program, and it was available. Nothing further was required."

Appellant's final contention on this appeal is that the trial court erred in failing to find that defendant was bound, either contractually or by estoppel, to protect quoted prices for the duration of the contracts entered into by plaintiff in reliance upon defendant's quotations.

Here again any conflicts in the testimony must be deemed to have been authoritatively resolved by the findings made by the trier of fact. The evidence seems to show that during many years of the close relationship between plaintiff and defendant, when plaintiff used defendant's tile whenever the job specifications permitted, it was the policy of defendant to protect the prices quoted throughout the duration of the contract.

But, as in many facets of American life, the OPEC increase in the price of oil in 1973 raised its ugly head in the tile industry and necessitated disruption of the practices previously prevailing.

Spurgeon testified that he had notified his customers, including plaintiff, that in view of impending shortages and drastic price increases, price protection would be afforded only for six months, commencing on January 1, 1974. The trial court found that plaintiff admitted that defendant protected all existing contracts through the first six months of 1974, "but the evidence and plaintiff's actions establish there was no contract by GAF for any price protection after

July 1, 1974, for it paid the increased price after that date without protest."

Accordingly, the trial court correctly concluded that defendant had fulfilled all its obligations with respect to price protection, and no basis for liability had been established by plaintiff with regard to this aspect of the case.

For the foregoing reasons, the judgment of the District Court is affirmed.

8/17/79

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1603

MARTY'S FLOOR COVERING CO., INC.,
Appellant,

vs.

GAF CORPORATION,
Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Dumbauld for a panel consisting of Judge Hall, Judge Phillips, and Judge Dumbauld.

For the Court,

/s/ William H. Slate, II
CLERK

APPENDIX E

Statutes

Sherman Anti-Trust Act, 15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

28 U.S.C. §144

§144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455

§455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bank-

ruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a

waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.